No. 91-726

In the Supreme Court of the United States

OCTOBER TERM, 1991

THELMA WEASENFORTH LUNAAS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Whether the statute of limitations, 28 U.S.C. 2501, bars an action against the government to recover the principal and interest on a loan made during the Revolutionary War.

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OPINIONS BELOW

The decision of the court of appeals, Pet. App. A2-A9, is reported at 936 F.2d 1277. The decision of the United States Claims Court, Pet. App. A10-A19, is unreported.

JURISDICTION

The judgment of the court of appeals, Pet. App. A1, was entered on June 25, 1991. A petition for rehearing was denied on July 31, 1991. Pet. App. A20-A21. The petition for a writ of certiorari was filed on October 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

According to the allegations in her complaint, petitioner is a descendant of one Jacob De Haven. In 1777-1778, De Haven lent the revolutionary government $450,000 in specie and supplies to support General Washington's army at Valley Forge. Pursuant to a contract authorized by the Continental Congress, the loan provided for six percent interest to be paid annually over the three-year term of the loan, and the United States pledged its full faith and credit for payment of the principal and interest. Despite numerous demands of De Haven, his heirs, and their descendants, petitioner alleges that no part of the loan or interest has been paid. Pet. App. A4.

In 1989, petitioner filed this action in the United States Claims Court to recover her share of the proceeds due. Pet. App. A4. Relying on the applicable six-year statute of limitations, 28 U.S.C. 2501, the Claims Court granted the government's motion to dismiss for lack of jurisdiction because petitioner's claim had accrued more than six years before she filed this action. *Id.* at A15.

The court of appeals affirmed. Pet. App. A3-A9. The court noted that De Haven demanded repayment prior to his death in 1812, and that his descendants made demands for repayment periodically between the 1850s and early 1900s. *Id.* at A7. Hence, in the court's view, even if a demand for repayment were essential to the accrual of a claim, the claim in this case accrued no later than 1863, when Congress first provided a judicial remedy for contract claims against the United States. *Id.* at A8. The court rejected petitioner's contention that Article VI of the Constitution, which transferred the debts of the Confederation to the new government, precludes the imposition of a limitations period on debts incurred by the gov-

ernment prior to the adoption of the Constitution. *Id.* at A8-A9.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals; further review is unwarranted.

1. This case turns on a straightforward application of 28 U.S.C. 2501, which provides:

> Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereof is filed within six years after such claim first accrues.

It is well settled that, for purposes of Section 2501, a claim "accrues" when all of the events fixing liability have occurred. See, *e.g.*, *L.S.S. Leasing Corp.* v. *United States*, 695 F.2d 1359, 1365 (Fed. Cir. 1982). In this case, the loan, made in 1777-1778, had a three-year term. Pet. App. A4. Petitioner concedes that a holder of preconstitutional government debt knew or should have known that a claim against the government existed after such debt was reaffirmed in Article VI of the Constitution. Pet. App. A7; Pet. 20. Indeed, De Haven presented his note for payment several times before his death in 1812. Pet. App. A7; C.A. App. 6, 8, 13.[1] And his descendants have made numerous demands for repayment, including the filing of petitions for relief with Congress in the 1850s, 1870s, 1890s, and early 1900s. Pet. App. A4, A7; C.A. App. 10. The court of appeals properly con-

[1] Because De Haven in fact demanded repayment, petitioner's contention, Pet. 6, 9, that De Haven had the option to postpone the deadline for repayment and accrue interest indefinitely is beside the point.

cluded, Pet. App. A6, that even if petitioner's claim were of the kind that accrues only when a demand for payment is made, see, *e.g.*, *Lins* v. *United States*, 688 F.2d 784, 787 (Ct. Cl. 1982) (citing cases), cert. denied, 459 U.S. 1147 (1983), it would be time-barred under Section 2501.[2]

In fact, the claim petitioner asserts here has been time-barred for 123 years. Although the First Congress established a plan for the administrative settlement of preconstitutional government debt, Act of Aug. 4, 1790, ch. 34, 1 Stat. 138,[3] the earliest opportunity for judicial redress arose in 1863. That year, Congress authorized the Court of Claims (the predecessor to the Claims Court) to render final judgments on contract claims against the United States. Act of Mar. 3, 1863, ch. 92, 12 Stat. 765. Although Congress provided that such claims were to be "forever barred" unless filed within six years of when they "first accrue[d]," a savings clause provided that claims accruing more than six years prior to the passage of the Act would not be barred if filed within three years. Act of Mar. 3, 1863, ch. 92, § 10, 12 Stat. 767. De Haven's descendants therefore had until 1866 to file suit for recovery of the loan and any interest due.

2. Petitioner contends, Pet. 11-23, that application of the statute of limitations to bar her claim violates Article VI of the Constitution. Article VI, Clause 1, provides that "[a]ll Debts contracted * * *

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[2] As a limitation or condition upon the sovereign's consent to be sued, Section 2501 "must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

[3] By subsequent enactments, Congress extended the plan until it finally expired in 1837. Pet. App. A6.

before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." Based on that clause, petitioner recasts her claim for repayment of a debt as a constitutional claim that is invulnerable to any statute of limitations.[4] As this Court has made clear, however, "[a] constitutional claim can become time-barred just as any other claim." *Block* v. *North Dakota*, 461 U.S. 273, 292 (1983).

Petitioner cites no authority suggesting that Article VI was intended to prohibit the United States from adopting an orderly mechanism for the disposition of the claims for debt assumed from the Confederation under Article VI. As petitioner's two-century-old contract claim well illustrates, a reasonable statute of repose is crucial to any rational processing of those claims:

> Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seri-

[4] Petitioner suggests, Pet. 20, that the Article VI claim accrued in 1887, when Congress authorized the Court of Claims to adjudicate claims arising under the Constitution. Act of Mar. 3, 1887, ch. 359, § 1, 24 Stat. 505. As petitioner acknowledges, Pet. 21, even under her view the statute of limitations would have expired in 1893 under the six-year limitations period.

> ously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. *Kubrick*, 444 U.S. 111, 117 (1979) (citations omitted). Particularly in view of the elementary constitutional principle that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued," *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941), it can hardly be assumed that the Framers silently forfeited the authority of the United States to adopt a reasonable limitations period for the claims transferred by Article VI.

3. Petitioner next contends that, even if Section 2501 bars her claim for interest that accrued more than six years before she filed this action in 1989, her claim for the principal and any interest accruing after 1983 survives under the continuing claim doctrine. Pet. 23-25. That contention is without merit. The continuing claim doctrine provides that when payments come due periodically by law or contractual right, "each successive failure to make proper payment gives rise to a new claim upon which suit can be brought." *Friedman* v. *United States*, 310 F.2d 381, 385 (Ct. Cl. 1962), cert. denied, 373 U.S. 932 (1963). As discussed, any claim to the principal amount of the loan became time-barred as of 1863.[5] Petitioner indicates no contractual or statutory basis for concluding that her claim to interest survived independently of the principal amount upon which

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[5] Petitioner suggests that she may invoke the continuing claim doctrine with respect to the principal because nonpayment effects a continuing constitutional violation. Pet. 25. That suggestion, however, merely rehearses her constitutional claim in the rubric of the continuing claim doctrine. As discussed, the constitutional claim is without merit.

that interest was due.[6] That omission is fatal to petitioner's claim because Congress is understood to have waived federal sovereign immunity against awards of interest "only where *expressly* agreed to under contract or statute." *Library of Congress* v. *Shaw*, 478 U.S. 310, 317 (1986) (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Hence, this case is distinct from those in which this Court has addressed the accrual of a cause of action on interest coupons appended to a bond. See, *e.g.*, *Amy* v. *Dubuque*, 98 U.S. 470 (1878); *Clark* v. *Iowa City*, 87 U.S. 583 (1874). In those decisions, the Court concluded that the coupons were themselves "separate written contracts, capable of supporting actions after their maturity, without reference to the maturity or ownership of the bonds." *Amy*, 98 U.S. at 475; see *Clark*, 87 U.S. at 589. In contrast, the interest here was "simply an incident of the debt." *Amy*, 98 U.S. at 472.

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